

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

NANETTE RANDOLPH,

Plaintiff

v.

JOVITA CARRANZA,<sup>1</sup> Administrator, U.S.  
Small Business Association,

Defendant

Case No.: 2:18-cv-00238-APG-NJK

**Order on Motions for Summary Judgment**

[ECF Nos. 51, 52, 60]

Nanette Randolph sues her former employer, the U.S. Small Business Administration (SBA), for discrimination based on age, race, and sex; for retaliation; and for failing to reasonably accommodate her disability. She moves for partial summary judgment on her failure to accommodate claim. The SBA moves for summary judgment on all of Randolph's claims. It also moves for leave to file supplemental authority, directing me to a recent case from the Supreme Court of the United States. For the following reasons, I grant the SBA's motion for summary judgment, I deny as moot the SBA's motion for leave to file supplemental authority, and I deny Randolph's motion for partial summary judgment.

**I. BACKGROUND**

Randolph started working for the SBA in its Nevada District Office in Las Vegas in 1998. ECF No. 52-2 at 7. She held different positions, including a stint with the Arizona District Office before returning to Las Vegas in 2010 to work on the 8(a) program as a Business Opportunity Specialist (BOS). *Id.* at 8-11. The 8(a) program is a nine-year business

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<sup>1</sup> I direct the clerk of court to substitute Jovita Carranza for Linda McMahon as the respondent, Administrator of the U.S. Small Business Association, on the docket for this case. *See* Federal Rule of Civil Procedure 25(d).

1 development program through which the SBA assists socially and economically disadvantaged  
2 small businesses with their business plans and provides guidance on obtaining federal contract  
3 opportunities. ECF Nos. 52-2 at 8-9; 52-3 at 3. From 2010 to May 2015, Randolph was allowed  
4 to telework two days per week, though the SBA could terminate the telework arrangement at any  
5 time. ECF Nos. 52-2 at 18-19; 51-27 at 22, 42.

6 In April 2014, Randolph was promoted to Lead Business Opportunity Specialist (LBOS).  
7 ECF No. 52-2 at 15. In that role, she was responsible for “providing guidance and business  
8 development assistance for a portfolio of small business firms” as well as promoting and  
9 marketing SBA programs and recruiting and training small businesses interested in receiving  
10 government contracts. ECF No. 51-3 at 2-4. Randolph was the only employee working on the  
11 8(a) program until Barry Van Orden was hired in November 2013 as a BOS. ECF Nos. 52-3 at 2,  
12 4; 52-2 at 11-12. As LBOS, Randolph was tasked with mentoring Van Orden, though Van  
13 Orden found working with Randolph to be difficult. ECF Nos. 52-3 at 4; 52-2 at 14, 16. He felt  
14 that she provided little support and mentorship with the 8(a) program. ECF No. 52-3 at 4.

15 During the times relevant to this case, Robert Holguin was the District Director of the  
16 Nevada Office and Eugene Cornelius was the Deputy Associate Administrator of the Office of  
17 Field Operations of the SBA. ECF No. 51-2 at 4. Around October 2014, Holguin interviewed  
18 and hired Daniel Lucero for the Deputy District Director role. ECF Nos. 52-2 at 17; 54-5 at 2.  
19 Lucero previously worked in the SBA’s North Carolina District Office, including on the 8(a)  
20 program. ECF No. 52-11 at 10-12. Soon after Lucero was hired, Randolph emailed Cornelius on  
21 October 14, 2014 about her concerns regarding preferential treatment in the hiring of Hispanic  
22 men in the Nevada office. ECF No. 54-5 at 2-3. Specifically, she noted that “[b]etween fiscal  
23 years 2013-2014 alone, three out of four hires have gone to Hispanic men, age 65+ and with

1 military ([N]avy) backgrounds” and that the recent Deputy District Director position went to a  
2 Hispanic male. *Id.* at 2. Cornelius responded that he was “looking into it”; he later testified that  
3 he went to Human Resources (HR), investigated the hiring selection process, and found no  
4 irregularities. *Id.*; ECF No. 52-17 at 9-10.

5 Lucero stated that within the first month of his employment he began having concerns  
6 about the 8(a) program. ECF No. 52-11 at 14. Files were not kept up to date, business plans and  
7 financial reports were missing, and “just a lot of things weren’t being done.” *Id.* Lucero brought  
8 the problems to Holguin’s attention. *Id.* at 17. Holguin was concerned that the office would be  
9 receiving an internal audit soon, so in February or March 2015 he put together a “strike force” to  
10 review the program. *Id.* at 17; ECF No. 56-20 at 4. The group consisted of Lucero, Randolph,  
11 Van Orden, Tom Martin (a lender relations specialist), and Sabrina Abousaleh (an administrative  
12 assistant). ECF Nos. 52-11 at 18; 52-3 at 5-6. However, Randolph went on extended leave in  
13 2015 and Van Orden focused on the day to day activities of the program, so Lucero, Martin, and  
14 Abousaleh conducted most of the review. ECF Nos. 52-3 at 6; 52-20 at 4-5, 7.

15 The review discovered missing required financial documents, tax returns, welcome  
16 letters, evidence of site visits, and annual review documentation. ECF No. 52-3 at 6. Further,  
17 several firms had to be removed from the program due to eligibility problems. *Id.* at 7. And,  
18 according to Van Orden, the hardcopy files were very disorganized. *Id.* Randolph stated that she  
19 had discussed issues with the 8(a) program since 2010 and that Holguin was aware that the files  
20 needed to be updated since he started working in the office in 2012. ECF No. 54-6 at 12-13. She  
21 also stated, “the goal has always been to hire someone to assist the 8(a) division to update those  
22 files.” *Id.* Subsequently, Van Orden was instructed in February 2015 to seek guidance from  
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1 Lucero instead of Randolph so that there was no conflicting information on how to correct the  
2 8(a) program. ECF Nos. 52-3 at 8; 54-7 at 5.

3 The problems with the 8(a) program were reflected in Randolph's January 2015 quarterly  
4 evaluation. *See* ECF No. 52-19. In years prior, Randolph received high performance ratings. *See*  
5 ECF No. 54-3 at 28, 35, 63, 87 (receiving between 4.6 and 5.0 out of 5.0 from 2011 to 2014).

6 On April 15, 2015, Randolph contacted her EEO Counselor, alleging she was discriminated  
7 against on the basis of race and sex, was subjected to a hostile work environment, and was  
8 retaliated against. ECF Nos. 54-7 at 3-4; 52-2 at 28. She alleged that since October 2014,  
9 Holguin "harassed and demanded that Randolph organize files from 2010 and put them in the  
10 file room" and that the demands started after Holguin was investigated for using government  
11 funds to interview Lucero. ECF No. 54-7 at 4. She stated that Holguin believed she had reported  
12 him, though another employee reported the conduct. *Id.* Examples of the alleged harassment  
13 included "minimizing the importance of [Randolph's] job position," blaming Randolph for the  
14 8(a) program deficiencies in front of her peers, removing her job responsibilities by having Van  
15 Orden report to Lucero instead of her, and receiving a poor quarterly performance review. *Id.* at  
16 5-6. Randolph also testified that she could not log into the main database, BDMIS, to complete  
17 her work from February to March 2015, that she believed Lucero requested that her access be  
18 denied, and that Holguin failed to rectify the situation. ECF No. 54-6 at 32-37.

19 On May 11, 2015, Holguin temporarily suspended Randolph's telework schedule "until  
20 such a time that our 8(a) program is in full compliance and our 8(a) annual reviews are 90% or  
21 higher of their expected completion dates." ECF No. 52-22 at 2. In his email, he stated that "all  
22 8(a) work will be required to be performed in the office." *Id.* In October 2015 Randolph  
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1 amended her EEO complaint to include as adverse actions losing her telework arrangement and a  
2 change in her position description. ECF No. 56-34 at 2.

3         Randolph soon began taking various forms of leave because she felt subjected to  
4 harassment and a hostile work environment. ECF No. 52-2 at 19. She went on leave from May  
5 4, 2015 until December 22, 2015. *Id.* at 19-20. During that time, she treated with clinical  
6 psychologist Dr. Pratt, who diagnosed her with suffering from general anxiety disorder and  
7 situational anxiety. *Id.* at 29. Dr. Pratt sent multiple emails over the months to Randolph's  
8 supervisors, assisting with her Family and Medical Leave paperwork and seeking to find work  
9 solutions such as a 100% telework agreement or reassignment to a different position within the  
10 SBA, all in hopes of relieving her situational anxiety. *See* ECF Nos. 52-27; 51-4. He also  
11 referred Randolph to a physician, Dr. Anwar, who wrote a letter on her behalf stating that a  
12 100% telework agreement would alleviate her problem. ECF No. 52-27 at 2.

13         Randolph first sought to reinstate her fixed telework schedule and return to the office in  
14 August 2015. ECF No. 52-24 at 2. However, Holguin denied Randolph's request to reinstate her  
15 fixed telework schedule due to efforts to get the 8(a) program in compliance. ECF No. 52-25 at  
16 2-3. He noted that "[u]ntil such time that we catch-up on our backlog, scheduled telework is  
17 suspended for the entire staff." *Id.* at 3. Randolph then sought a 100% telework arrangement as a  
18 reasonable accommodation. ECF No. 52-26 at 2. Her accommodation request was reviewed by  
19 Holguin, Cornelius, and an independent agency through an interagency agreement, the Federal  
20 Occupational Health Service (FOH). *See* 52-30. The SBA and the FOH determined that the  
21 medical information provided was insufficient to support her accommodation request. *Id.* at 14.  
22 While the FOH was reviewing Randolph's request, however, Cornelius offered to allow her to  
23 have two fixed telework days per week for six months. *Id.* at 9. Accordingly, Randolph returned

1 to work on December 22, 2015 with her two-day per week telework schedule. ECF No. 52-2 at  
2 21-22. Additionally, Randolph sought reassignment as an alternative accommodation. ECF No.  
3 51-28 at 2. Cornelius testified that he never received Randolph's request or resumé in support of  
4 a job reassignment and that, regardless, there were no vacant positions available in the  
5 commuting area for reassignment. ECF No. 52-17 at 20-24. He relayed this information to  
6 Randolph via telephone. *Id.* at 24.

7 After hearing from the FOH and consulting with HR and the legal department, Cornelius  
8 rescinded Randolph's telework arrangement in March 2016. ECF No. 52-2 at 24. Randolph,  
9 with advice from Dr. Pratt, did not go back to work, coordinated her resignation date based on  
10 leave she had, and terminated her employment with the SBA in April 2016. *Id.*

11 Randolph commenced this suit against the SBA in February 2018. ECF No. 1. In her  
12 complaint, she alleges four causes of action: (1) discrimination in federal employment in  
13 violation of the Rehabilitation Act; (2) retaliation in violation of Title VII; (3) age discrimination  
14 in violation of the Age Discrimination in Employment Act of 1967 (ADEA); and  
15 (4) discrimination on the basis of race and sex in violation of Title VII.

## 16 **II. ANALYSIS**

17 Summary judgment is appropriate if the movant shows "there is no genuine dispute as to  
18 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.  
19 56(a), (c). A fact is material if it "might affect the outcome of the suit under the governing law."  
20 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if "the evidence  
21 is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

22 The party seeking summary judgment bears the initial burden of informing the court of  
23 the basis for its motion and identifying those portions of the record that demonstrate the absence

1 of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The  
2 burden then shifts to the non-moving party to set forth specific facts demonstrating there is a  
3 genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531  
4 (9th Cir. 2000); *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018) (“To defeat  
5 summary judgment, the nonmoving party must produce evidence of a genuine dispute of material  
6 fact that could satisfy its burden at trial.”). I view the evidence and reasonable inferences in the  
7 light most favorable to the non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523  
8 F.3d 915, 920 (9th Cir. 2008).

#### 9 **A. Timeliness of Randolph’s Claims**

10 The SBA contends that Randolph is time-barred from recovering on several of the  
11 alleged incidents that make up her claims because she did not contact an EEO counselor within  
12 45 days of each incident as required to exhaust her claims. ECF No. 52 at 9-10. Randolph first  
13 contacted an EEO Counselor on April 15, 2015. Thus, the SBA argues she is time-barred from  
14 recovering on incidents that occurred before March 1, 2015, including: (1) Holguin’s comment  
15 during a January 2015 staff meeting asking why Randolph was still working after 31.5 years;  
16 (2) Randolph’s January 2015 low performance rating; (3) Van Orden notifying Randolph that  
17 Holguin told him not to accept any assignments from her in February 2015; (4) portions of  
18 Randolph’s allegations that she could not access the BDMIS database which inhibited her ability  
19 to do her job; and (5) portions of Randolph’s allegations that her LBOS job duties and  
20 responsibilities were removed. *Id.* at 10.

21 Randolph responds that a hostile work environment claim constitutes a single unlawful  
22 employment practice and therefore her allegations were timely brought to the EEO Counselor.  
23 ECF No. 53 at 5. The SBA replies that Randolph did not plead a hostile work environment

1 claim, but rather asserts retaliation and discrimination, so each alleged act must occur within the  
2 45-day period. ECF No. 58 at 3-5.

3 A federal employee must exhaust all administrative remedies before bringing  
4 discrimination claims against her employer. *Cherosky v. Henderson*, 330 F.3d 1243, 1245 (9th  
5 Cir. 2003). Federal regulations require that Randolph consult with an EEO Counselor “within 45  
6 days of the date of the matter alleged to be discriminatory” to try to informally resolve the  
7 dispute short of filing a complaint. 29 C.F.R. § 1614.105(a) and (a)(1). Although the regulation  
8 “does not carry the full weight of statutory authority,” failure to comply with this pre-filing  
9 exhaustion requirement is “fatal to a federal employee’s discrimination claim.” *Lyons v.*  
10 *England*, 307 F.3d 1092, 1105 (9th Cir. 2002).<sup>2</sup>

11 Randolph alleges she was subject to discrimination and retaliation based on incidents  
12 dating back to January 2015, but it is undisputed that she contacted the EEO Counselor on April  
13 15, 2015. ECF Nos. 54-7 at 3-4; 52-2 at 28. Accordingly, any incidents that occurred prior to  
14 March 1, 2015 are barred due to failure to exhaust. *See Nat’l R.R. Passenger Corp. v. Morgan*,  
15 536 U.S. 101, 110-13 (2002) (noting that a discrete act occurred on the day it happened and that  
16 “[e]ach discriminatory act starts a new clock for filing charges alleging that act”). Because  
17 Randolph’s only allegation of age discrimination occurred during a staff meeting in January  
18 2015, I grant the SBA’s motion as to Randolph’s ADEA claim. In doing so, I need not consider  
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22 <sup>2</sup> The 45-day deadline is an administrative “requirement that, like a statute of limitations, is  
23 subject to waiver, estoppel, and equitable tolling.” *Zipes v. Trans World Airlines, Inc.*, 455 U.S.  
385, 393 (1982) (referring generally to the limitations period under Title VII); *see also* 29 C.F.R.  
§ 1614.105(a)(2) (stating that the complainant will not be required to comply with the filing  
period if she can show that she “was not notified of the time limits and was not otherwise aware  
of them”). However, Randolph makes no case for waiver here.



1 the SBA's motion for leave to file supplemental authority related to the ADEA claim, so I deny  
2 that motion as moot.

3        Randolph's complaint does not assert a hostile work environment claim. *See* ECF No. 1.  
4 The complaint states that Dr. Pratt determined she was subjected to a hostile work environment,  
5 but it does not plead facts to demonstrate what behavior, and by whom, created a hostile work  
6 environment; whether the harassment was based on race, sex, age, or some other protected class;  
7 or whether such a claim was separate or part of her retaliation claim. *Id.* Randolph argues that  
8 she complained to the EEO about "a series of retaliatory adverse personal actions" and that those  
9 actions were investigated to determine whether she was subjected to a hostile work environment.  
10 ECF No. 53 at 5. The SBA replies that Randolph did not plead facts showing a plausible claim  
11 for a hostile work environment based on her race, gender, or age. ECF No. 58 at 4.

12        Randolph has not shown that she was subjected to unwanted conduct based on her race,  
13 sex, or other protected class that "was sufficiently severe or pervasive to alter the conditions of  
14 her employment." *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1109 (9th Cir. 2008). Instead,  
15 she has presented a series of discriminatory acts that are divisible. *Morgan*, 536 U.S. at 105 ("We  
16 hold that the statute precludes recovery for discrete acts of discrimination or retaliation that occur  
17 outside the statutory time period."); *see also Lyons*, 307 F.3d at 1105, 1108 (holding appellants'  
18 Title VII claims based on a pervasive pattern of discrimination could proceed only on incidents  
19 that occurred within the 45-day limitations period). Accordingly, Randolph may proceed with  
20 incidents that occurred on or after March 1, 2015. However, she may use the time-barred  
21 incidents as background evidence for her discrimination and retaliation claims. *Lyons*, 307 F.3d  
22 at 1110-11.

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1           **B. Rehabilitation Act**

2           The Rehabilitation Act protects an “otherwise qualified individual with a disability” from  
 3 discrimination solely because of her disability “under any program or activity receiving Federal  
 4 financial assistance.” 29 U.S.C. § 794(a). “In determining whether a federal agency has violated  
 5 the Rehabilitation Act, the standards under Title I of the Americans with Disabilities Act  
 6 (‘ADA’) apply.” *McLean v. Runyon*, 222 F.3d 1150, 1153 (9th Cir. 2000). To establish a prima  
 7 facie case, a plaintiff must demonstrate the she is (1) an individual with a disability,  
 8 (2) otherwise qualified, and (3) subject to discrimination because of her disability. *Bates v.*  
 9 *United Parcel Serv., Inc.*, 511 F.3d 974, 988 (9th Cir. 2007). Discrimination “includes an  
 10 employer’s not making reasonable accommodations to the known physical or mental limitations  
 11 of an otherwise qualified . . . employee, unless [the employer] can demonstrate that the  
 12 accommodation would impose an undue hardship on the operation of [its] business.” *US EEOC*  
 13 *v. UPS Supply Chain Sols.*, 620 F.3d 1103, 1110 (9th Cir. 2010) (alteration in original) (internal  
 14 quotations and emphasis omitted).

15           “A disability is ‘a physical or mental impairment that substantially limits one or more  
 16 major life activities of [the] individual [who claims the disability],’ or ‘a record of such an  
 17 impairment,’ or ‘being regarded as having such an impairment.’” *Weaving v. City of Hillsboro*,  
 18 763 F.3d 1106, 1111 (9th Cir. 2014) (citing 42 U.S.C. § 12102). The ADA provides a  
 19 nonexhaustive list of major life activities, including caring for oneself, concentrating, thinking,  
 20 and working. *Id.*

21           The SBA argues that Randolph is not disabled as defined by the Act because situational  
 22 anxiety related to her office environment does not render her unable to work in a broad category  
 23 of jobs. ECF No. 52 at 11. It points to her testimony where she was asked if she had any

1 limitations or impairments other than the office environment and Randolph responded “No.” *Id*  
2 at 12 (citing Randolph’s deposition testimony, ECF No. 52-2 at 27). And it argues that  
3 Randolph’s doctors acted more like lawyer-advocates based on subjective information rather  
4 than doctors diagnosing a disabling condition. *Id.* at 12-13. Randolph responds that a reasonable  
5 jury could conclude that her impairment substantially impacted her major life activity of working  
6 because Dr. Pratt diagnosed her with situational anxiety. ECF No. 53 at 13-14.

7 By Randolph and her doctors’ admissions, her anxiety was “situational” and related only  
8 to her current workplace environment. Temporary impairment based on work-related stress does  
9 not establish a mental impairment that substantially impacts a major life activity. *See Hosea v.*  
10 *Donley*, 584 F. Appx. 608, 611 (9th Cir. 2014) (“The district court correctly determined that  
11 Hosea failed to establish that he had a disability because his doctors found him only temporarily  
12 unable to work based on acute work related stress from July 13, 2010, through September 25,  
13 2010.”); *Sanders v. Arenson Prod., Inc.*, 91 F.3d 1351, 1354 (9th Cir. 1996) (noting “temporary,  
14 non-chronic impairments of short duration, with little or no long term or permanent impact, are  
15 usually not disabilities”).

16 Even if Randolph could establish that she is disabled as defined by the Act, she has not  
17 demonstrated that she was otherwise qualified for her position. An individual is qualified if  
18 “with or without reasonable accommodation, [she] can perform the essential functions of the  
19 employment position . . . .” 42 U.S.C. § 12111(8). “The court first examines whether the  
20 individual satisfies the requisite skill, experience, education and other job-related requirements  
21 of the position. The court then considers whether the individual can perform the essential  
22 functions . . . with or without a reasonable accommodation.” *Samper v. Providence St. Vincent*  
23 *Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012) (citing *Bates*, 511 F.3d at 990). The employee

1 retains the burden of proof in making her prima facie case, but the employer has the burden of  
2 production “in establishing what job functions are essential.” *Id.* To meet this burden, the  
3 employer “must clearly set forth, through the introduction of admissible evidence, reasons for its  
4 actions which, *if believed by the trier of fact*, would support a finding favorable to the  
5 defendant.” *Id.* (emphasis in original) (quotation omitted). In *Samper*, the court expressed that  
6 some jobs require physical attendance as an essential function of employment. *Id.*

7       Here, the SBA has presented evidence that the 8(a) program needed to be brought into  
8 compliance. The files were not being kept up to date and the physical files maintained in the  
9 office were disorganized. Randolph herself noted that she had been discussing issues with the  
10 program as far back as 2010. The SBA also retained Dr. Jay Finkleman as an expert in Human  
11 Resources management, who opined that Holguin and Lucero demonstrated why reduced  
12 telework was necessary to reach the office’s goals and properly relayed that information to  
13 Randolph. *See* ECF No. 56-35. And Van Orden stated the he did not have a fixed telework  
14 arrangement (nor did he believe anyone else in the office apart from Randolph had such an  
15 arrangement) and rarely used or asked for ad hoc telework, so he was physically present in the  
16 office to work on the 8(a) program. ECF No. 56-3 at 8. Thus, the SBA has met its burden of  
17 establishing that physical presence in the office was an essential function of employment for  
18 someone, like Randolph, who was working on the 8(a) program.

19       While it may not have been necessary to require full-time physical presence in the office,  
20 I need not decide that issue because Randolph sought to be placed on 100% telework as her  
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1 accommodation. No reasonable jury could find that Randolph was qualified for a position that  
2 required at least some physical presence in the office as an essential function.<sup>3</sup>

3 Randolph also requested reassignment to another position as a potential accommodation.  
4 A reasonable accommodation may include “reassignment to a vacant position.” 42 U.S.C.  
5 § 12111(9)(B). A plaintiff is otherwise qualified “if [s]he could perform the essential functions  
6 of [her] job once provided the reasonable accommodation of reassignment.” *Anthony v. Trax*  
7 *Int’l Corp.*, 955 F.3d 1123, 1134 (9th Cir. 2020).

8 Cornelius testified that he never received Randolph’s request for reassignment or her  
9 resumé. He also testified that there were no vacant positions available in the commuting area at  
10 the time. Randolph argues that she submitted the proper documentation and that Cornelius failed  
11 to investigate open positions and produce a data base reflecting available positions for which she  
12 was qualified. ECF No. 53-1 at 11. However, Randolph, who bears the burden of establishing  
13 her prima facie case, presents no evidence to counter Cornelius’s assertion that there were no  
14 open positions in the area that she was qualified for at the time. Accordingly, no genuine dispute  
15 remains that Randolph was not otherwise qualified with or without a reasonable accommodation.

16 I grant the SBA’s motion as to Randolph’s reasonable accommodation claim. And  
17 because Randolph fails to establish her prima facie case, I deny her motion for partial summary  
18 judgment on this claim. Randolph’s motion focused on the SBA’s purported failure to engage in  
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20 <sup>3</sup> The SBA presented substantial evidence that it engaged in the interactive process with  
21 Randolph and that her accommodation request was not reasonable. Holguin, Cornelius, and an  
22 external federal agency reviewed Randolph’s accommodation request for a 100% telework  
23 schedule. Cornelius also consulted with HR and the legal department. And while Randolph’s  
accommodation request was pending, Cornelius allowed her to continue teleworking two days  
per week. Based on the evidence presented, it is difficult to see how a reasonable jury could find  
that Randolph’s request to telework full time was reasonable and that the agency failed to engage  
in the interactive process. I need not reach the issue, however, because I grant the SBA’s motion  
and deny Randolph’s motion on other grounds.

1 the interactive process and to reasonably accommodate her disability, both of which are required  
2 only after an employee establishes that she was an otherwise qualified individual with a  
3 disability.

#### 4 **C. Retaliation**

5 Title VII prohibits retaliation by making it unlawful “for an employer to discriminate  
6 against any of [its] employees or applicants for employment . . . because [she] has opposed any  
7 practice made an unlawful employment practice by this subchapter.” 42 U.S.C. § 2000e–3(a). A  
8 federal employee may bring suit under Title VII’s antiretaliation provision based on 42 U.S.C.  
9 § 2000e–16. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000). To establish a prima facie  
10 case of retaliation, Randolph “must be able to show that she suffered an adverse employment  
11 action because she engaged in activity protected by the statute.” *Campbell v. Haw. Dep’t of*  
12 *Educ.*, 892 F.3d 1005, 1021 (9th Cir. 2018).

13 “An action is cognizable as an adverse employment action if it is reasonably likely to  
14 deter employees from engaging in protected activity.” *Ray*, 217 F.3d at 1243. “Among those  
15 employment decisions that can constitute an adverse employment action are termination,  
16 dissemination of a negative employment reference, issuance of an undeserved negative  
17 performance review and refusal to consider for promotion.” *Brooks v. City of San Mateo*, 229  
18 F.3d 917, 928 (9th Cir. 2000). “[M]ere ostracism by co-workers does not constitute an adverse  
19 employment action.” *Ray*, 217 F.3d. at 1241 (quotation omitted). However, a lateral transfer  
20 may constitute an adverse employment action in some circumstances. *Id.* “Context  
21 matters.” *Burlington N. & Santa Fe Ry. Co., v. White*, 548 U.S. 53, 69 (2006).

22 Once the plaintiff establishes a prima facie case, the burden of production shifts to the  
23 employer “to present legitimate reasons for the adverse employment action.” *Brooks*, 229 F.3d at

1 928. If the employer meets its burden, the plaintiff must then “demonstrate a genuine issue of  
2 material fact as to whether the reason advanced by the employer was a pretext” for retaliation. *Id.*  
3 “That an employer’s actions were caused by an employee’s engagement in protected activities  
4 may be inferred from proximity in time between the protected action and the allegedly retaliatory  
5 employment decision.” *Ray*, 217 F.3d at 1244. To prevail, Randolph must show that the  
6 retaliation was the but-for cause of the adverse employment action. *Univ. of Texas Sw. Med. Ctr.*  
7 *v. Nassar*, 570 U.S. 338, 360 (2013).

8 Randolph alleges she engaged in protected activity when she voiced her concerns to  
9 Cornelius about preferential treatment in hiring of Hispanic men in the Nevada office. For the  
10 purposes of its motion, the SBA assumes Randolph engaged in protected activity, but argues that  
11 she cannot demonstrate that the SBA took an adverse action because of that activity. ECF No. 52  
12 at 15-16. And it argues that most of the alleged adverse actions are time-barred. *Id.* Randolph in  
13 response points to several adverse actions: (1) being removed of her essential duties as LBOS;  
14 (2) false allegations of poor work performance; (3) losing her supervisory role over Van Orden;  
15 and (4) receiving a poor quarterly evaluation. ECF No. 53 at 15-17, 20.<sup>4</sup> And she argues that,  
16 prior to Lucero’s hiring, she never received a poor performance rating and was considered a top  
17 BOS employee. *Id.* at 17. She argues that these actions, which occurred in close proximity to her  
18 protected activity, show that any legitimate reason proffered by the SBA is pretext.

19 As discussed above, Randolph’s alleged adverse actions are time-barred. Randolph  
20 alleges she was removed as LBOS effective February 2015. Van Orden was instructed not to  
21 receive assignments from Randolph in February 2015. Randolph received a poor quarterly  
22

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23 <sup>4</sup> Randolph asserts these arguments to support her Rehabilitation Act and discrimination claims. I assume that she intended these arguments to also apply to her retaliation claim, though she does not provide a clear argument for that claim.

1 performance review in January 2015. She notes that she was falsely accused of mishandling and  
2 throwing away files, but that incident occurred prior to March 1, 2015. ECF No. 54-6 at 19.  
3 While Randolph does not specifically address this in her response, out of an abundance of  
4 caution I assume she also intended to identify as adverse actions her telework being rescinded  
5 and alleged harassment by Holguin and Lucero.

6 Harassment may constitute an adverse employment action. *See Ray*, 217 F.3d at 1244-45.  
7 But the harassment must create a hostile work environment that is “sufficiently severe or  
8 pervasive to alter the conditions of the victim’s employment and create an abusive working  
9 environment.” *Id.* 1245. Randolph does not present evidence of harassing behavior other than  
10 her general statement to her EEO investigator that Lucero and Holguin would put her down,  
11 challenge her decisions, and isolate her from her peers. *See, e.g.*, ECF No. 54-6 at 51. She does  
12 not explain what words were used or how often the alleged harassment occurred so that a fact-  
13 finder could determine the severity of the situation. And Dr. Pratt’s assertions that Randolph  
14 was subjected to a hostile work environment, without more, provide no clarity. Based on this  
15 evidence, and the otherwise time-barred alleged adverse employment actions that Randolph  
16 contends amounts to harassment, Randolph has not demonstrated that these incidents created an  
17 environment sufficiently severe or pervasive to alter the conditions of her employment.  
18 Accordingly, no reasonable jury could find that Randolph was subjected to a hostile work  
19 environment in retaliation for engaging in protected activity.

20 Finally, assuming without deciding that rescinding an employee’s telework arrangement  
21 could be considered an adverse employment action, as I explained above the SBA had legitimate  
22 reasons for doing so. Randolph has not raised a genuine issue of material fact as to whether this  
23 reason was pretext. Randolph emailed Cornelius about her concerns regarding preferential



1 hiring of Hispanic men in October 2014. Holguin suspended Randolph's telework (and gave her  
2 notice of the change so that she could adjust accordingly) on May 11, 2015. In between that  
3 time, a review of the program revealed many issues that needed to be resolved. Given the  
4 evidence presented, the proximity in time between the protected activity and adverse action does  
5 not support an inference of retaliatory motive. *See Coszalter v. City of Salem*, 320 F.3d 968, 978  
6 (9th Cir. 2003) (noting that timing needs to be considered in regard to its factual setting).

7         Randolph has not met her burden of showing that the SBA's contention that she needed  
8 to be physically present to help bring the 8(a) program into compliance is pretext. Holguin  
9 created a strike force, which brought in staff from other projects to help prepare for the internal  
10 audit. The SBA has shown that physical presence was a necessary aspect of the job. The  
11 physical files are maintained in the building. Other employees on the strike force stated they did  
12 not use their ad hoc telework while working on the 8(a) program. For example, Martin was  
13 tasked with reviewing the hard copy files to identify what documents were missing. ECF No. 56-  
14 20 at 4. That had to be done in the office. Further, Holguin suspended Randolph's telework  
15 arrangement temporarily and explained in his email to her what goals needed to be accomplished  
16 before her telework privileges could be reinstated. And Randolph acknowledges there were  
17 issues with the 8(a) program. Thus, no reasonable jury could find that Randolph's telework  
18 privileges were rescinded because she engaged in protected activity. Accordingly, I grant the  
19 SBA's motion as to this claim.

#### 20         **D. Race and Sex Discrimination**

21         Title VII makes it unlawful for an employer to discriminate against an individual  
22 "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-  
23 2(a)(1). A plaintiff may establish a prima facie case of discrimination by showing (1) the

1 plaintiff belongs to a protected class; (2) she was performing her job satisfactorily; (3) she  
2 suffered an adverse employment action; and (4) employees outside of her protected class with  
3 similar qualifications were treated more favorably. *Cornwell v. Electra Cent. Credit Union*, 439  
4 F.3d 1018, 1028 (9th Cir. 2006). If the plaintiff makes out a prima facie case, “[t]he burden of  
5 production, but not persuasion, then shifts to the employer to articulate some legitimate,  
6 nondiscriminatory reason for the challenged action.” *Chuang v. Univ. of Cal. Davis*, 225 F.3d  
7 1115, 1123-24 (9th Cir. 2000). “If the employer does so, the plaintiff must show that the  
8 articulated reason is pretextual either directly by persuading the court that a discriminatory  
9 reason more likely motivated the employer or indirectly by showing that the employer’s  
10 proffered explanation is unworthy of credence.” *Id.* at 1124 (internal quotation and citation  
11 omitted).

12       The SBA argues that Randolph was not performing to its legitimate expectations, she  
13 cannot show an adverse action that is not time-barred, and she cannot show that similarly  
14 situated employees were treated more favorably. ECF No. 52 at 16-17. Randolph responds that  
15 the SBA’s claim that she did not effectively do her job is pretext for discrimination because she  
16 was the only employee whose telework privileges were rescinded. ECF No. 53 at 17-18.

17       Even viewing the evidence in the light most favorable to Randolph and assuming that  
18 rescinding telework privileges constitutes an adverse employment action, no reasonable jury  
19 could find that the SBA discriminated against Randolph on the basis of race or sex. Randolph  
20 has not met her burden of proving that the SBA treated her differently than similarly situated  
21 employees that do not belong to her protected class. Randolph was the only employee assigned  
22 to the 8(a) program for years until Van Orden joined. She remained the only LBOS as Van  
23 Orden entered the SBA as a BOS. And Randolph was the only person utilizing a fixed telework

1 schedule in the Nevada office. Therefore, even though she argues that she was the only person  
2 whose telework was rescinded, the SBA could not have treated other employees more favorably  
3 because no one was similarly situated to her. *See Vasquez v. Cty. of L.A.*, 349 F.3d 634, 641 (9th  
4 Cir. 2003) (noting “individuals are similarly situated when the have similar jobs and display  
5 similar conduct” and “[e]mployees in supervisory positions are generally deemed not to be  
6 similarly situated to lower level employees”).

7       Additionally, the evidence presented shows that Randolph was not performing her job  
8 satisfactorily. Lucero identified multiple problems with the program, as did Van Orden and  
9 Martin. Randolph herself acknowledges that there were issues with the program, though she  
10 denies that the program’s deficiencies were due to her mismanagement. Martin, a lender  
11 relations specialist who joined the 8(a) program “strike force,” stated there were many problems  
12 with the program, including that only one file had the correct financial information inputted into  
13 the system and financial and tax documents were missing. ECF No. 52-20 at 4. He also stated  
14 that Randolph was invited to, but did not participate in, bringing the 8(a) program into  
15 compliance. *Id.* at 5. Finally, he stated that Randolph falsified reports in 2013 and 2014 to  
16 indicate that ineligible or nonoperating businesses were still eligible for the program. *Id.* at 5-7.  
17 Randolph presents no evidence to counter the assertion that she falsified documents so that  
18 businesses could remain eligible for the program. And Randolph presents no evidence to  
19 contradict the SBA’s evidence of poor job performance, except that she had positive prior annual  
20 performance ratings. But Lucero was hired and tasked with ensuring the program was in  
21 compliance for an internal audit, and he found issues with the program that previously went  
22  
23

1 unnoticed. Even viewing the evidence in the light most favorable to Randolph, she fails her  
2 burden of establishing a prima facie case of discrimination.<sup>5</sup>

3 Further, there is no evidence to suggest that Holguin's act in suspending Randolph's  
4 telework privileges was motivated by race or sex. Accordingly, I grant the SBA's motion as to  
5 Randolph's discrimination claim.

### 6 **III. CONCLUSION**

7 I THEREFORE ORDER that defendant Jovita Carranza's motion to file supplemental  
8 authority (**ECF No. 60**) is **DENIED as moot**.

9 I FURTHER ORDER that plaintiff Nanette Randolph's motion for partial summary  
10 judgment (**ECF No. 51**) is **DENIED**.

11 I FURTHER ORDER that defendant Jovita Carranza's motion for summary judgment  
12 (**ECF No. 52**) is **GRANTED**. The clerk of court is instructed to enter judgment in favor of the  
13 defendant and against the plaintiff and to close this case.

14 DATED this 28th day of May, 2020.

15   
16 \_\_\_\_\_  
17 ANDREW P. GORDON  
18 UNITED STATES DISTRICT JUDGE  
19  
20

21 <sup>5</sup> The SBA also argues that Randolph cannot claim she was constructively discharged from  
22 employment. Randolph does not respond to this argument. Randolph's complaint does not  
23 specifically assert a constructive discharge claim under Title VII. Even so, a constructive  
discharge claim would fail because Randolph must first prove she was subject to discrimination.  
See *Green v. Brennan*, 136 S. Ct. 1769, 1777 (2016) ("A plaintiff must prove first that he was  
discriminated against by his employer to the point where a reasonable person in his position  
would have felt compelled to resign.").